only 'intentional' but also connotes something which is done without lawful excuse".

It is clear in the present case that the appellant had a licence to be in the chief assistant district officer's office. When he was told to leave, the licence expired and thenceforth he became a trespasser and consequently he had no lawful excuse for his presence in that office. In my judgment the learned magistrate has given full effect to the law under section 186 of the Penal Code. The appeal against conviction is dismissed.

I now come to sentence. It has been said over and over again that an appellate court is reluctant to interfere in matters of sentence unless it can be shown to be manifestly excessive. Each case must be decided on its merits. For my part, I am of the opinion that the circumstances of this case do not warrant a severe sentence of three months. No harm has been done to anybody except the appellant himself. It is not improper to say that the appellant has allowed passion to take the place of reason, and I think that the sentence imposed by the learned magistrate is unduly excessive. In the circumstances I would allow the appeal against sentence, set aside the sentence of three months' imprisonment, and substitute an order of binding over under section 294 of the Criminal Procedure Code to keep the peace for a period of one year in the sum of $500.

Appeal against conviction dismissed.
Appeal against sentence allowed.
Sentence of imprisonment set aside, order of binding over substituted.

Solicitors: *T. Selvarasan & Co.*

NASIB KAUR & ANOR. v. CHEAH KIT & ANOR.

[O.C.J. (MacIntyre J.) September 14, 1967]
[Ipoh — Civil Suit No. 29 of 1965]

Damages — Negligent driving — Fatal injuries — Damages for loss of expectation of life — Contributory negligence — Doctrine of res ipsa loquitur — Interest on damages.

The plaintiffs claimed damages against the defendants arising out of the death of the first plaintiff's husband from fatal injuries sustained in a motor car accident. To prove negligence, the plaintiffs relied on circumstantial evidence, and upon the doctrine of *res ipsa loquitur*. The second defendant who was the only eye witness available gave two different versions: one at the inquest and the other at the trial of the accident. The deceased was 32 years of age at the time of his death and was employed as a watchman by the National Electricity Board at a salary of $140 per mensem. He was given free living quarters and free electricity and water.

Held: (1) in view of the contradictory evidence given by the second defendant at the trial and at the inquest, the court was unable to come to any conclusion as to whether the deceased contributed to the accident or not;

(2) the defendants were liable in damages which would be assessed at $320 as special damages and general damages at $15,000.

The plaintiffs also claimed for interest at 6% per annum from date of the death of the deceased to date of the payment of decretal amount.

Held: this was not a proper case in which the court should exercise its discretion in favour of awarding interest as claimed.

Cases referred to:—

(1) *G. Sivarayan* v. *Swee Lam Estate (M) Ltd.* [1966] 1 M.L.J. xvii & xxxi.

(2) *Carr & Anor.* v. *Boxall* [1960] 1 All E.R. 495.

CIVIL SUIT.

Atma Singh Gill for the plaintiffs.

N. H. Chan for the defendants.

Cur. Adv. Vult.

MacIntyre J.: This is a claim under sections 7 and 8 of the Civil Law Ordinance, 1956, brought by the 1st plaintiff as the widow and administratrix of the estate of Kerpal Singh, deceased, and by the 2nd plaintiff as co-administrator, for damages against the 1st and 2nd defendants arising out of the death of the said Kerpal Singh from fatal injuries sustained in a motor car accident at Ipoh at about 8.50 p.m. on the 6th day of December 1963. The accident is alleged to be caused by the negligent driving of motor car AB 910 by the 2nd defendant as the servant or agent of the 1st defendant, the registered owner thereof.

To prove negligence, the plaintiffs rely on circumstantial evidence, and upon the doctrine of *res ipsa loquitur*.

It is unfortunate that the only eye witness available to give evidence is the 2nd defendant (hereinafter referred to as 'the defendant'). Another witness who was in the car with him at the time of the accident is said to have gone away to Sarawak without leaving a forwarding address.

The accident took place at Lahat Road, Ipoh. Prior to the accident the defendant was driving the car towards Ipoh, and when about 40 feet from the junction with Jalan Connolly on his left, he saw the deceased on a bicycle about 10 feet away from the stop/look/go sign at Jalan Connolly riding fast towards the junction. According to the defendant it did not occur to him that the deceased had no intention of stopping at the sign-post and had therefore not reduced his speed which was then about 25 m.p.h. The deceased then rode into Jalan Lahat and turned to his left and instead of keeping to the left of the road, rode diagonally across towards the centre resulting in a collision with his car.

In cross-examination the defendant admitted

giving evidence at the inquest and saying that the cyclist was at the stop/look/go sign-post when he was about 3 or 4 yards from the junction. At this stage the whole of his evidence was admitted by consent for the purpose of cross-examination (vide page 20 to 20D of Bundle "A"). His version of the incident given at the inquest was to the effect that when he was about 3 or 4 yards from the stop/look/go sign at Jalan Connolly, he saw the deceased riding out of Jalan Connolly without stopping at the sign-post. He immediately applied his brakes and swerved his car to his right. He was, by that time, almost abreast of the sign-post, but could not avoid the accident. The cycle hit the left mudguard of his car and fell to a side while deceased fell beside his car near the centre of the road where he had pulled up.

If the defendant's version given at the inquest is correct, the brake mark of the car on the road should have commenced at a point opposite the sign-post. According to the sketch plan drawn by the investigating officer the brake mark commences 49' 2" beyond the junction. It would appear as if the defendant had now changed his story to fit in with the sketch plan of which he was probably not aware when giving evidence at the inquest as his evidence was recorded first. According to the sketch plan the bicycle was found on the left side of Lahat Road about 43' 6" beyond the junction, the brake mark commenced about 49' 2" beyond the junction and the deceased's body was found about 79 feet beyond the junction. It is clear that the collision occurred when the defendant was attempting to overtake the bicycle at a distance of about 43½ feet beyond the junction. The defendant has also admitted in evidence that he did not apply his brakes till after the impact. In the circumstances, the accident could have only happened if he was not keeping a proper lookout and had driven the car regardless of possible consequences. I hold, therefore, that the defendant had driven the car in breach of his duty of care.

Had the accident occurred at the junction I might have held that the deceased contributed to the accident. But the accident did not take place at the junction but 43 feet beyond the junction. In view of the contradictory evidence given by the defendant at the trial and at the inquest, I am unable to come to any conclusion as to whether the deceased had contributed to the accident or not.

The special damages claimed is $320 made up as follows:—

(a) Funeral expenses	$250.00
(b) Damage to clothing	$ 20.00
(c) Damage to bicycle	$ 50.00
Total:	$320.00

I award the full sum claimed.

I come now to the question of general damages. The deceased was employed as a watchman by the National Electricity Board at a salary (including C.O.L.A.) of $140 per mensem. He was given free living quarters and free supply of electricity up to 14 units valued at $3.50 and free supply of water up to 1,500 gallons valued at $2.00. He gave a sum of $100 a month to the plaintiff, and out of this sum she met the household expenses which included such items as food, clothing and the cost of educating the three elder of their five children. A sixth child was born posthumously but it died later.

Taking into consideration the benefits of the invisible income enjoyed by the dependants in the form of accommodation in a rent free house and free supply of electricity and water to the value of $5.50, I will value the dependency of the widow and her five children at $90 per mensem.

The deceased was 32 years of age at the time of his death and there is nothing in the evidence to indicate that he could not have worked up to his 55th year, which is the average age of retirement in the public services. After making the allowances for the usual contingencies, besides the prospect of the widow re-marrying and the fact that the children would cease to be dependants when they become eligible for employment and/or in the case of daughters on marriage, I assess the dependency at $15,000.

I award a sum of $300 under section 8 of the Civil Law Ordinance. This sum, of course, will merge with the award of $15,000 under section 7.

I apportion this amount as follows:—

To the widow	$ 6,200.
To eldest child	$ 800.
To 2nd child	$ 1,400.
To 3rd child	$ 1 800.
To 4th child	$ 2,300.
To 5th child	$ 2,500.
Total:	$15,000.

There is also a claim for interest at 6% per annum from date of the death of the deceased on December 7, 1963, to date of payment of the decretal amount. I was referred to the decision of Azmi J. (as he then was) in *G. Sivarayan* v. *Swee Lam Estate (M) Ltd.*[1] in which interest was granted and in respect of which a commentary appears in [1966] 1 M.L.J. xxxi. I was also referred to the case of *Carr & Anor.* v. *Boxall.*[2] I hold that this is not a proper case on which I should exercise my discretion in favour of awarding interest as claimed. However, the decretal amount will carry interest at 6% till date of realisation.

In the result there will be judgment for the plaintiff for $15,000 with interest at 6% from date of judgment to date of realisation, judgment for $320 for special damages and the cost of this action.

Order accordingly.

Solicitors: *Atma Singh Gill; Cheang Lee & Ong.*

MEENACHI SUNDARAM v. MALAYAN BANKING LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) September 18, 1967]

[Ipoh — Federal Court Civil Appeal No. X. 12 of 1967]

Practice and Procedure — Whether order of court when once perfected and entered can be amended after a lapse of a year.

In certain proceedings brought by the bank against an executor of an estate, the appellant herein, to recover moneys secured by charges against lands belonging to the estate, charged by the executor, a certain order was made by the learned judge pursuant to agreement reached between counsel for the parties. An order was drawn by counsel for the executor, its draft having been approved with certain amendments by counsel for the bank, was finally perfected and entered in the book in the registry. After about a year later, counsel for the executor made an application to have the order amended by restoring the word "personally", which was struck out by counsel for the bank when in its draft form, on the ground that there had been an accidental slip or omission. The learned judge held that there was no accidental slip or omission as the omission of the word "personally" was made intentionally with the knowledge and acquiescence of counsel for the executor and dismissed the application. On appeal:

Held: it was a simple question of fact whether or not there was a slip, and therefore there was no reason to disagree with the learned judge.

Case referred to:—

(1) *Farhall* v. *Farhall* (1871-2), L.R. 7 Ch. App. 123.

FEDERAL COURT.

N. Sharma for the appellant.

Lim Kean Chye and *A. S. Yeo* for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Ipoh, dismissing the appellant's application that the order of the court dated 14th February 1966 be amended by adding the word "personally" to paragraph 2 of the order so that that paragraph would read as follows:—

"It is ordered, that the originating summons (Enclosure 2) be and is hereby struck out but without prejudice to the rights of the chargee/applicants to file fresh proceedings against the respondent personally."

It is I think necessary to refer to the facts of the case.

The appellant, an executor of the last will of one Veerasamy dece sed, and as such, executed several charges against certain lands belonging to the estate in favour of the respondent for the purpose of securing an overdraft allowed by the respondent, amounting to $812,752.02.

In November 1964, the respondent through their solicitors served a notice on the appellant demanding payment of the said sum. When the appellant failed to comply with the notice the respondent took out an originating summons (No. 766 of 1964) calling upon the appellant to show cause why the said lands should not be auctioned.

On 4th October 1965, the respondent obtained the order of the court ordering among other things that the said land be sold by public auction.

On 3rd January 1966, however, before the lands could be auctioned the appellant took out a summons to have the order of the 4th October set aside on the ground *inter alia* that (a) he, the appellant had no authority to charge the lands as they formed a part of the estate of the deceased and (b) that no notice in accordance with the provision of section 138 of the Land Code had been served on him.

On 14th February 1966 the above summons came before MacIntyre J.

By consent of both Mr. Yeo for the respondent and Mr. Sharma for the appellant the learned judge made an order striking out the originating summons No. 766 of 1964 but without prejudice to the right of the respondent to file fresh proceedings against the appellant. At the same time Mr. Sharma for the appellant withdrew his application to have the originating summons struck out.

The judge's notes of this proceeding read as follows:—

"Yeo now says he wishes to withdraw the originating summons altogether without prejudice to his client's right to institute action against Meenachi Sundaram personally.

Sharma withdrew summons in chambers enclosure 18. No order as to costs."

Subsequently Mr. Sharma put up a draft order which reads as follows:—

"It is ordered that the originating summons (Enclosure 2) be and is hereby struck out but without prejudice to the right of the chargee/applicants to file fresh proceedings against Meenachi Sundaram personally."

But when the draft was sent to Mr. Yeo he amended it by striking out the words "Meenachi Sundaram personally" and substituting therefor the words "the respondent." The draft order as amended by Mr. Yeo was apparently sent back to Mr. Sharma and it was subsequently entered in the book in the Registry.